Anchor-Harvey Components, LLC and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Its Local 2127. Case 33–RM–373

August 29, 2008

## DECISION AND DIRECTION

## BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The National Labor Relations Board has considered determinative challenges in an election held on May 3, 2006, and the hearing officer's report recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Decision and Direction of Election. One hundred and six ballots were cast in the election, all of which were challenged.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

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The Employer is an Illinois corporation that operates an aluminum and brass-forging business. The Employer and the Union were parties to a collective-bargaining agreement covering the Employer's production and maintenance employees that expired on September 30, 2003. The bargaining unit employees went on strike on October 2, 2003. The Employer began to hire replacement workers almost immediately, and on December 19, 2003, informed the Union that the striking employees had been permanently replaced. On December 29, 2003, the Union made an unconditional offer to return to work on behalf of the striking employees. On about January 7, 2004, the Employer locked out the striking workers. This lockout continued through the time of the hearing.

The Employer filed a petition for a decertification election in August 2005. An election was held on May 3, 2006, in which 106 of the replacement workers and former strikers cast ballots. The Employer challenged the ballots of 53 former strikers on the ground that they had abandoned their jobs; the Board agent challenged 45 of those individuals because their names were not on the *Excelsior* list. The Board agent also challenged the ballots of six replacement workers, who were hired after the

lockout began, on the same basis. The Union challenged the ballots of 47 replacement workers on the ground that they were not permanent replacements, and further challenged 11 of the 47 replacement workers on alternative grounds.

The parties resolved a number of challenges at the beginning of the hearing.<sup>2</sup> Most significantly, the Employer withdrew its challenge to the ballots of the former strikers based on job abandonment, except for its challenge to the ballots of Robert Nieman and Dan Jones.<sup>3</sup> At the same time it withdrew its job abandonment challenge, the Employer asserted that "the fact that [the employees] were not on the *Excelsior* List still remains at issue."

The Employer withdrew its job abandonment challenge to the ballots of Nieman and Jones on the second day of the hearing. Although Nieman's name did not appear on the *Excelsior* list, the Employer made no assertion at the time it withdrew its challenge that it continued to contest Nieman's ballot on another basis.

During the hearing, the Union raised an alternative basis for its challenge to three replacement workers who were classified as material handlers—Carlos Villegas, Joshua Saldecki, and Mark Haag—arguing that these employees held positions that were not included in the bargaining unit. The Union apparently raised the same argument in its posthearing brief with regard to replacement workers John Wilkerson, David Waack, and Wayne Edgren.

II.

The hearing officer found that the Employer had permanently replaced the strikers prior to the lockout, and that the replaced strikers were ineligible to vote because the election occurred more than a year after the strike began. Accordingly, the hearing officer recommended that the Board sustain the Employer's challenge to the ballots of the replaced strikers and overrule the Union's challenge to the ballots of the replacement workers. The hearing officer further recommended that the Board overrule the Union's alternative challenge to the material handlers' ballots because it had not been raised prior to the hearing, and was therefore untimely.

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>2</sup> The details are set forth in the hearing officer's report.

<sup>&</sup>lt;sup>3</sup> The parties stipulated that Darla Martz and John Winterhalter had abandoned their jobs prior to the election and thus were ineligible to vote.

<sup>&</sup>lt;sup>4</sup> See Sec. 9(c)(3) of the Act.

<sup>&</sup>lt;sup>5</sup> The hearing officer also found that the Union's alternative challenge to the ballots of replacement workers who held the title of quality inspector had no merit. The Union has not excepted to this finding. Accordingly, we adopt the hearing officer's finding and overrule that challenge.

In recommending that the Board sustain the challenge to the ballots of the replaced strikers, the hearing officer rejected the Union's argument that the Employer's failure to raise the issue that the strikers had been permanently replaced prior to the hearing precluded the Employer from challenging the ballots on that basis. Rather, the hearing officer concluded that the Employer had appropriately challenged the ballots of the replaced strikers by failing and refusing to include their names on the *Excelsior* list, and that no further challenge was necessary. Based on that conclusion, the hearing officer rejected the Union's argument that he was required to treat the Employer's alternative challenge to the replaced strikers' ballots in the same manner as the Union's alternative challenge to the material handlers' ballots.

The Union, in its exceptions, contends that the hearing officer erred in (1) finding that the Employer timely raised the argument that the strikers had been permanently replaced, and in recommending that the Board sustain the Employer's challenge to the ballots of the replaced strikers on that basis; (2) failing to treat the parties' alternative grounds for their respective challenges, which were both raised initially at the hearing, in the same manner; (3) finding that the Employer's refusal to include the former strikers on the *Excelsior* list constituted a valid challenge to their ballots; and (4) failing to recommend that Robert Nieman's ballot be counted, as the Employer assertedly has withdrawn its challenge to his ballot.

As explained below, on the threshold issues of timeliness, we find that the alternative challenges made by the Employer and the Union were timely raised.<sup>6</sup> On the merits, we sustain the Employer's challenge to the ballots of the permanently replaced strikers,<sup>7</sup> but find it unnecessary at this time to decide whether striker Nieman's ballot should be opened and counted. We also find it unnecessary to determine at this time the merits of the challenge to the material handlers' ballots.

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The Board requires that any challenge to a voter's eligibility must be made before the contested ballot is dropped in the box and commingled with the others, so that the uncontested ballots can be given absolute finality. The Board will not entertain a postelection challenge to a ballot unless the party that would benefit from the

Board's refusal to entertain such a challenge knows that a voter is ineligible and conceals that ineligibility. See, e.g., *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946); *Solvent Service*, 313 NLRB 645 (1994).

However, a party may raise and litigate an alternative ground for a properly challenged ballot during a hearing, even if that alternative ground had not been raised prior to the hearing. In Coca-Cola Bottling of Miami, 237 NLRB 936 (1978), the Board agent challenged the ballot of striker replacement D. W. Davis on the ground that Davis was not included on the *Excelsior* list. The union, which challenged the ballots of all other striker replacements on the ground that the strike was an unfair labor practice strike, did not likewise challenge Davis' ballot because it considered such a challenge superfluous in light of the challenge by the Board agent. At the hearing, it was determined that Davis' name was on the Excelsior list and that the Board agent had mistakenly challenged the ballot. The union then stated that it wanted to challenge the ballot on the same basis as the other striker replacements. The judge found that there was no postelection challenge issue "so long as Davis' ballot remains sealed, and that the Board is free to sustain the challenge to his ballot on any valid litigated ground." The judge further found, in the circumstances presented, "it would be contrary to statutory policy to treat Davis' unopened ballot differently" from the other striker replacements. Id. at 952. The Board adopted these findings.

Here, as in *Coca-Cola Bottling*, supra, the disputed ballots were appropriately challenged at the election, the parties raised their alternative grounds for their respective challenges for the first time at the hearing, and the alternative grounds for the challenges were litigated. Thus, we find that both the Employer's alternative ground for its challenge to the replaced strikers and the Union's alternative ground for its challenge to the material handlers' ballots were timely raised.

Accordingly, we affirm the hearing officer's finding that the Employer's alternative challenge (that the former strikers had been permanently replaced) was timely, and sustain the challenge to the ballots of the replaced strikers. Similarly, we reverse the hearing officer's finding that the Union's alternative challenge to the ballots of three replacement workers classified as material handlers (Carlos Villegas, Joshua Saldecki, and Mark Haag) was untimely, and find that the challenge is properly before the Board. However, we do not now decide the merits

<sup>&</sup>lt;sup>6</sup> In doing so, we do not rely on the hearing officer's rationale that the Employer's omission of the strikers' names from the *Excelsior* list constituted a valid challenge to their ballots.

<sup>&</sup>lt;sup>7</sup> The Union has not excepted to the hearing officer's finding that the replacement workers had permanently replaced the former strikers and were therefore eligible to vote. Consequently, we adopt the hearing officer's finding and overrule the Union's challenge to those ballots.

<sup>&</sup>lt;sup>8</sup> The Union has not explicitly excepted to the hearing officer's finding that its alternative basis for the challenge to the material handlers' ballots was untimely. Rather, the Union contends that the hearing officer erred in failing to treat the timeliness of the alternative challenges of both parties in the same manner. We find that the Union has preserved

of that challenge—i.e., whether the material handlers are appropriately included in the unit. Nor do we now decide the question of whether Robert Nieman's ballot should be opened and counted. Rather, we will remand this proceeding to the Regional Director with instructions that the status of those ballots be held in abeyance unless they become determinative to the outcome of the election, at which time the Regional Director shall take further appropriate action.

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 33 shall, within 14 days from the date of this decision,

its right to have the Board consider its challenge to the material handlers' ballots.

However, we find that the Union's alternative challenge to the ballots of material handlers John Wilkerson, David Waack, and Wayne Edgren, which were not litigated at the hearing but rather raised in the Union's posthearing brief, are untimely. Cf. J. K. Pulley Co., 338 NLRB 1152, 1153 (2003) (Board rejected hearing officer's recommendation to sustain a challenge to employee's ballot on the basis that employee was related to company's owner where the relationship issue was not a stated basis for the challenge to the ballot, the parties adduced little evidence at the hearing on the issue, and the hearing officer gave the parties no indication that he would consider the issue).

<sup>9</sup> The Union contends that there is no outstanding challenge to Robert Nieman's ballot because the Employer withdrew its challenge, and that the hearing officer erred in failing to recommend that Nieman's ballot be opened and counted. The Employer argues that although it withdrew its job abandonment challenge to Nieman's ballot, it continued to contest the ballot on the ground that Nieman's name was not on the *Excelsior* list.

open and count the ballots of the following voters: Steven Bushey, Leslie Thomas, Michael Steele, Daniel Jones, Eugene Saxby, Dale Schnulle, Dale Diddens, Roger Garrett, Sherry Tyner, Eunice Brown, Kerri Hoover, David Waack, William Way, Fred Dempsey Sr., Christopher McCullum, Thomas Johnson, Jesus Conchas Sr., Larry Outcelt, Kevin Meyer, Clay Wesson, Jonathan Mercer, Carlos Cornejo, Alvaro Ramirez, Michael Bowen, Morayne Dir, Richard Gage, Wayne Edgren, Michael Thomas, Alfonzo Ortiz, Gerald Sanders, Jesus Burgos, Robert Gray, Mario Maciel, Derek Heitter, Rigoberto Conchas, Marco Marciel, Isaias Sanchez, Trent Gains, Jose Mata, Ahmed Al-Sadun, John Wilkerson, Dustin Peterson, Donna Brown, Zelda Peak, Angela Barnhart, Oscar Picon, Sharene Hamilton, and Michael Uhlig.

IT IS FURTHER ORDERED that the Regional Director shall hold in abeyance the ballots of Robert Nieman, Carlos Villegas, Joshua Saldecki, and Mark Haag until the ballots of the voters listed above are opened and counted. If the ballots of Nieman, Villegas, Saldecki, and Haag become determinative to the outcome of the election, then the Regional Director shall take further action consistent with this Decision and Direction. If those ballots are not determinative, they shall remain sealed, and the Regional Director shall prepare and serve on the parties a tally of ballots and issue the appropriate certification.